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# Property Law

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## I. NUISANCE EXCEPTION TO TAKINGS DOCTRINE STRETCHED PAST TRADITIONAL LIMITS

In *Lucas v. South Carolina Coastal Council*[1] the South Carolina Supreme Court held that an application of the South Carolina Beachfront Management Act (the Act)[2] which precluded the owner of two vacant beachfront lots from building a single-family residence on either lot did not constitute a taking of private property without just compensation. The majority[3] opinion characterized the Act as a regulation on the use of property "necessary to prevent a great public harm"[4] and therefore concluded that no regulatory taking had occurred even though the Act's application deprived the landowner of all economically viable use of the lots.[5]

In 1986 David Lucas purchased two vacant oceanfront lots in the Wild Dunes development located on the Isle of Palms in Charleston County, South Carolina.[6] Lucas planned to build a single-family dwelling on each lot.[7] In 1988 the South Carolina legislature passed the Beachfront Management Act, which limited construction on lands adjoining the Atlantic Ocean.[8] As applied, the Act prohibited Lucas from

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1. 404 S.E.2d 895 (S.C. 1991), *cert. granted*, 60 U.S.L.W. 3208 (U.S. Nov. 18, 1991) (No. 91-453).

2. 1988 S.C. Acts 634 (codified as amended at S.C. CODE ANN. §§ 48-39-10, -130, -270 to -360 (Law. Co-op. Supp. 1988)) (amended 1990).

3. The court split three to two in reaching its decision. Justice Toal wrote the majority opinion, joined by Chief Justice Gregory and Justice Finney. Justice Harwell wrote a dissenting opinion, in which Justice Chandler concurred.

4. *Lucas*, 404 S.E.2d at 898. The court relied in great part on legislative findings. Because the property owner did not challenge the findings, the court refused to question them. *Id.*

5. *Id.* at 899, 901.

6. *Id.* at 895.

7. *Id.* at 907 (Harwell, J., dissenting).

8. The Act establishes two lines that largely define the scope of the Act's coverage. First, the Act authorizes the use of scientific and historical data to create a "baseline" that parallels South Carolina's shoreline. S.C. CODE ANN. § 48-39-280(A) (Law. Co-op. Supp. 1988) (amended 1990). Second, the Act creates a "setback line," which is located landward of the baseline "at a distance which is forty times the average annual erosion rate," but "no less than twenty feet landward of the baseline." *Id.* § 48-39-280(B)(1). The area between the setback line and the mean high-water mark of the Atlantic Ocean is the "beach/dune system." *Id.* § 48-39-270(5). The Act heavily regulates construction in this area. *See id.* §§ 48-39-290, -300.

building permanent structures on either lot, except for a small deck or walkway.[9]

After the South Carolina Coastal Council (the Council) denied Lucas's applications for building permits,[10] he filed an action in the Charleston County Court of Common Pleas. Lucas argued that the use restrictions constituted a taking of his property without just compensation. Lucas presented evidence that "the Act's prohibition against the erection of any habitable structure caused the value of the lots to plummet to zero."[11] Lucas asked for monetary relief. The trial court held that a taking had occurred and awarded Lucas $1,232,387.50 as just compensation. The supreme court reversed.[12]

The South Carolina Supreme Court began its analysis of the constitutional issue[13] presented by observing that the United States Supreme Court has never established a brightline test for deciding " 'where regulation ends and taking begins.' "[14] The *Lucas* court noted, however, that the United States Supreme Court has articulated various factors to aide in determining when a regulation rises to the level of a taking.[15] The factors, as recognized by the *Lucas* court, include: "(1) the economic impact of the regulation; (2) the regulation's interference with investment backed expectations; (3) the character of the government action (whether there is a physical invasion); and (4) the nature of the State's interest in the regulation."[16]

Noting that "[o]ne or more but fewer than all of these factors may be critical and determinative in a given case,"[17] the *Lucas* court found the fourth factor, the nature of the state's interest in the regulation, dispositive. The court quoted the General Assembly's declaration of the "findings" and "policy" that underlie the Act[18] and noted that Lu-

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9. *Lucas*, 404 S.E.2d at 896.

10. The Council is the state agency charged with administering the Act. S.C. CODE ANN. § 48-39-50 (Law. Co-op. 1987).

11. *Lucas*, 404 S.E.2d at 907 (Harwell, J., dissenting).

12. *Id.* at 896.

13. Takings jurisprudence is grounded in the Fifth Amendment's prohibition against the taking of private property for public use without just compensation. *See* U.S. CONST. amend. V. The Fourteenth Amendment's Due Process Clause extends this prohibition to the states. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897). The South Carolina Constitution also bars the taking of private property without just compensation. S.C. CONST. art. I, § 13.

14. *Lucas*, 404 S.E.2d at 898 (quoting Moore v. Sumter County Council, 300 S.C. 270, 272 n.2, 387 S.E.2d 455, 457 n.2 (1990)).

15. *Id.*

16. *Id.* at 899 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)).

17. *Id.*

18. *Id.* at 896-98 (quoting 1988 S.C. Acts 634 §§ 1, 2 (codified as S.C. CODE ANN. §§ 48-39-250, -260 (Law. Co-op. Supp. 1990))). For an explanation of the somewhat confus-

cas conceded the validity of these pronouncements.[19] The court summarized the effect of this concession on Lucas's claim:

> By failing to contest these legislative findings, Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm. This Court is likewise bound by these uncontested legislative findings.[20]

Consequently, the court characterized the issue as "whether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a 'regulatory taking'[21] of property for which compensation must be paid."[22] Relying on *Keystone Bituminous Coal Association v. DeBenedictis*,[23] the court stated that a " 'prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking.' "[24] The court labeled this doctrine the "*Mugler* rule."[25] Applying this rule, the court concluded that because the Beachfront Management Act "prevented a use seriously harming the public . . . no regulatory taking

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ing procedural history of these two sections, see *id.* at 896 n.2.

19. *Id.* at 896.

20. *Id.* at 898.

21. A regulatory taking differs from a situation in which the government physically takes possession of property under its eminent domain powers. In the latter situation courts uniformly hold that the takings clause requires the payment of just compensation. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 (1964). In a regulatory takings context the government does not physically take possession of the property, but rather restricts the use of the property to such a degree that the owner argues that the government has effectively taken the property. Courts are not uniform in determining when regulations become so onerous as to require compensation. In the opinion of one legal scholar, "[b]y far the most intractable constitutional property issue is whether certain governmental actions 'take' property without satisfying the constitutional requirements of due process and just compensation." Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984) (footnote omitted).

22. *Lucas*, 404 S.E.2d at 896 (footnote added).

23. 480 U.S. 470 (1987).

24. *Lucas*, 404 S.E.2d at 900 (quoting *Keystone*, 480 U.S. at 489 (quoting Mugler v. Kansas, 123 U.S. 623, 668 (1887))).

25. *Id.* at 901. The Court first recognized the doctrine in Mugler v. Kansas, 123 U.S. 623 (1887). The theory behind the *Mugler* rule is " 'that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.' " *Lucas*, 404 S.E.2d at 899 (quoting *Keystone*, 480 U.S. at 491 n.20). This legal principle also has been labeled the "nuisance exception." *Id.* at 901 n.5 (referring to *Keystone*, 480 U.S. at 512 (Rehnquist, J., dissenting)).

ha[d] occurred."[26]

Although the legal principles underlying the *Mugler* rule are well established,[27] the *Lucas* court's reliance on *Mugler* and its progeny[28] seems misplaced. Indeed, the ramifications of *Lucas* go beyond those of the *Mugler* line of cases, which address the government's attempt to abate public nuisances.[29]

It is well settled that the government can prohibit a public nuisance without incurring any obligation to compensate the proprietor.[30] Therefore, it becomes important to define nuisance. Unfortunately, the parameters of nuisance are incapable of precise determination.[31] No brightline test exists for determining what uses are a nuisance. An analysis of the decisions relied upon by the *Lucas* court discloses, however, two main classes of nuisance.[32]

One class includes situations in which owners intentionally devote their property to uses directly antagonistic to the health, morals, or safety of the public.[33] Building a home on one's property is not directly hostile to the health, safety, or morals of the people of South Carolina. Therefore, Mr. Lucas's intended use of his property should not fall within the first class of nuisance. The second class includes situations in which an accepted activity becomes unacceptable merely because it is inappropriate or hazardous in a particular setting.[34] Lucas's pro-

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26. *Lucas*, 404 S.E.2d at 899.

27. *See id.* at 901.

28. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

29. *See Keystone*, 480 U.S. at 491.

30. *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

31. In Miller v. Schoene, 276 U.S. 272 (1928), the United States Supreme Court upheld the state-ordered destruction of a property owner's red cedar trees infected with a disease that threatened nearby apple orchards. The Court concluded that it "need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law" because the impending danger of the spread of the disease to the apple orchards made the state's decision "unavoidable." *Id.* at 280.

32. Comment, *Houses on the Sand: Taking Issues Surrounding Statutory Restrictions on the Use of Ocean Front Property*, 18 B.C. ENVTL. AFF. L. REV. 125, 140 (1990).

33. *Id.*; *see* Mugler v. Kansas, 123 U.S. 623 (1887) (upholding state legislation that prohibited the manufacture of alcoholic beverages); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955) (upholding ordinance that mandated the repair, alteration, or closing of dwellings unfit for habitation); Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943) (upholding a statutory prohibition on the Sunday sale of intoxicating liquors).

34. Comment, *supra* note 32, at 141. This situation often occurs when residential neighborhoods emerge around previously existing industrial areas. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (upholding town ordinance that regulated dredging and pit excavation within city limits); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding municipal ordinance that prohibited the operation of a brickyard within a residential neighborhood).

posed action also does not fall within this class of nuisance.

Although it seems reasonable to argue that the presence of a residence in critical areas of the "beach/dune system" falls within the second type of nuisance, this assertion breaks down upon closer examination. The hazardous effects to the public safety and welfare that arise from permanent structures located in critical areas of the "beach/dune system" are relatively insignificant.[35] Assertions that the Act's prohibitions are necessary to protect the public against the dangers of hurricanes and other tropical storms[36] are not persuasive. Current weather forecasting technology provides adequate time to allow evacuation. In addition, property damage can be minimized by establishing building code standards that are sufficient to enable permanent structures to withstand hurricane forces.

Proponents of a law may be tempted to define nuisance as any use of property that violates a state statute that is supported by a legitimate public purpose. However, such an interpretation renders meaningless the protection afforded by the Fifth Amendment's Takings Clause. Governments can almost always articulate some legitimate public purpose to support the broad exercise of police powers. Under this interpretation an owner would never be entitled to compensation, no matter how egregious the economic impact, as long as the legislature acted to further a legitimate public purpose.[37]

Accordingly, the appropriateness of the South Carolina Supreme Court's reliance on the nuisance exception[38] in determining that no

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35. The potential dangers presented in *Lucas* are not comparable to the potential dangers addressed in *Goldblatt*, 369 U.S. at 595 (attractiveness of water-filled gravel quarry to children), or *Hadacheck*, 239 U.S. at 408 (sickness and discomfort caused by noxious fumes and pollution emitted by a brickyard). Moreover, "the Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that [beachfront] residences are not dire threats to public safety and welfare." Esposito v. South Carolina Coastal Council, 939 F.2d 165, 173 n.2 (4th Cir. 1991) (Hall, J., dissenting).

36. *See* 1988 S.C. Acts 634 §§ 1(1)(a), 2(1)(a) (codified as S.C. CODE ANN. §§ 48-39-250, -260 (Law. Co-op. Supp. 1990)).

37. *See* Comment, *supra* note 32, at 140. This interpretation also would contradict United States Supreme Court precedent. In Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the Court noted that it had previously "held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.' " *Id.* at 485 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). Chief Justice Rehnquist has stated that "[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting).

38. Because Lucas did not challenge the Act's legislative findings that new construction would cause serious public harm, the court held that Lucas conceded "that the *Mugler* 'nuisance-like exception' applies." *Lucas*, 404 S.E.2d at 900.

taking occurred in *Lucas* is debatable. This is not to suggest that the court should have found a taking, but only that the issue demanded further analysis. The court should have considered the economic impact of the Act on Lucas.[39]

The South Carolina Supreme Court's holding in *Lucas* marks a significant break with prior cases that involve takings issues. Those cases usually required the existence of a situation similar to a public nuisance before the court would ignore the economic impact of the challenged legislation. The practitioner that contemplates a regulatory takings challenge should be aware that *Lucas* holds that the economic impact of legislation is irrelevant as long as the legislation prohibits uses which threaten "serious public harm." Even though some will hail *Lucas* as a victory for the state in its efforts to protect and restore South Carolina's beaches, the decision will certainly have a deleterious impact on the rights of private property owners.

*C. Dan Wyatt, III*

## II. PRIVATELY CONSTRUCTED CANAL CONNECTED TO A RIVER MAY BE NAVIGABLE WATERS

In *Hughes v. Nelson*[40] the South Carolina Court of Appeals held that a privately constructed canal connected to a river may be navigable waters. Consequently, the owner of the land surrounding the canal may not obstruct public access to the canal. This holding is consistent with South Carolina case law and reaffirms this state's long-standing policy of broadly interpreting what constitutes navigable waters.[41]

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39. A distinction can be drawn between cases in which government acts to abate a nuisance and cases in which government prohibits generally acceptable uses of property in order to enhance the public health and welfare. *See* Comment, *supra* note 32, at 142. *Lucas* falls in the enhancement category and the court therefore should have weighed the economic impact of the Act and the Act's interference with investment backed expectations in its analysis. *See, e.g., Penn Central*, 438 U.S. at 124.

40. 399 S.E.2d 24 (S.C. Ct. App. 1990).

41. The scope of this Article is limited to a discussion of what constitutes navigable waters in South Carolina. It should be noted, however, that the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, grants to the United States Congress the ultimate authority over navigable waters. *See* Leovy v. United States, 177 U.S. 621, 632 (1900) ("The power of Congress to regulate such waters is . . . incidental to the express 'power to regulate commerce . . . .' "). The South Carolina Supreme Court has stated that the requirements for waters to be considered navigable under federal law are different from the requirements under state law. *See* State *ex rel.* Medlock v. South Carolina Coastal Council, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986) ("In order to be navigable under the United States, the water must connect with other water highways so as to subject them to the laws of interstate commerce."). This distinction permits a state to control the waters within its

In 1972 Lindberg Hughes dug a canal across his property to the Edisto River. Construction of the canal was a major undertaking. The canal extended approximately seventeen hundred feet away from the river. Its depth ranged from twelve to twenty feet and its width from fifteen to thirty feet. Although a few times a year lack of water made access to the canal difficult, normally a problem did not exist. The canal proved to be very good for fishing.[42]

Hughes sold the property adjacent to the canal. In the sale agreement Hughes expressly reserved the right to use the canal. Over the years he and others made sporadic attempts to prevent the public from fishing in the canal. These attempts included the placement of a gate across the canal's mouth, the stringing of wire across the canal's mouth, and the placement of "No Trespassing" signs. Eventually, Anthony Nelson became the owner of the property surrounding the canal. He attempted to thwart even Hughes's use of the canal. Hughes then brought suit against Nelson.[43]

Hughes alleged that the canal constituted navigable waters and that Nelson's attempts to block access to the canal were unlawful. The circuit court agreed with Hughes, ordered Nelson to remove all obstructions from the canal, and enjoined Nelson from further blocking access to the canal. Nelson appealed. The court of appeals affirmed.[44]

The *Hughes* court began its analysis by stating that without question "the unauthorized obstruction of navigable waters is unlawful."[45] The court noted that Nelson did not dispute that he had obstructed the canal.[46] Accordingly, the only issue before the *Hughes* court was "whether the waters of the canal are navigable waters, making the canal a public highway, or whether, on the other hand, the canal is private property, like a privately owned road."[47]

In reaching its decision, the *Hughes* court applied a test first articulated by the South Carolina Supreme Court nearly a century ago in *Heyward v. Farmers' Mining Co.*[48] The *Hughes* court stated that to

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borders using criteria other than those established by the United States Supreme Court. When federal interests are at stake, however, federal law controls. Wald, *Navigability — Its Meaning and Application in South Carolina, Water Resources Research Project*, 23 S.C.L. REV. 28, 29 (1971).

42. *Hughes*, 399 S.E.2d at 25.

43. *Id.*

44. *Id.* at 24.

45. *Id.* Article XIV, section 4 of the South Carolina Constitution states, "All navigable waters shall forever remain public highways free to the citizens of the State and the United States . . . ." S.C. CONST. art. XIV, § 4, *quoted in Hughes*, 399 S.E.2d at 24.

46. *Hughes*, 399 S.E.2d at 24.

47. *Id.* at 25.

48. 42 S.C. 138, 19 S.E. 963 (1894), *cited with approval in* State *ex rel.* Medlock v. South Carolina Coastal Council, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986).

determine if a waterway is navigable, " '[t]he true test to be applied is whether a stream inherently and by its nature has the capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use.' "[49]

In applying this test, the *Hughes* court initially observed that the canal's manner of creation, artificial rather than natural, was not controlling.[50] The court concluded that the waters were in fact navigable because the public had used the canal for more than fifteen years.[51] The court further concluded that it was insignificant that the use of the canal was for pleasure and not for commercial activities.[52] "It would, indeed, be difficult to imagine a more valuable floatage than a fishing boat on the Edisto River."[53]

Nelson argued that the canal was not navigable waters because (1) the canal was too shallow at certain times of the year to sustain boat traffic, (2) a permit administrator employed by the South Carolina Water Resources Commission told him that a man-made channel must be at least twenty years old to be considered navigable waters, and (3) the canal was private property.[54] The *Hughes* court quickly disposed of these arguments. Responding to Nelson's first argument, the court noted that navigability does not require accessibility at all times.[55] Rather, the test of navigability "is whether [the waterway] is accessible 'at the ordinary stage of the water.' "[56] During the majority of the year the canal is accessible by water.

The court addressed the permit administrator's twenty-year rule by stating that "[n]o such limitation exists, as a matter of law, on the

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49. *Hughes*, 399 S.E.2d at 25 (quoting *Medlock*, 289 S.C. at 449, 346 S.E. at 719). Although not mentioned by the *Hughes* court, the General Assembly has declared what constitutes navigable waters. *See* S.C. CODE ANN. § 49-1-10 (Law. Co-op. 1987). This section provides:

> All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States . . . .

*Id.* In *Medlock* the supreme court explained that this section merely codified the law established in *Heyward*. *Medlock*, 289 S.C. at 449, 346 S.E.2d at 719.

50. *Hughes*, 399 S.E.2d at 25.

51. *Id.*

52. *Id.* (citing *Medlock*, 289 S.C. at 450, 346 S.E.2d at 719; *Heyward*, 42 S.C. at 155, 19 S.E. at 972); *see also* State *ex rel.* Lyon v. Columbia Water Power Co., 82 S.C. 181, 189, 63 S.E. 884, 888 (1909) ("Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure.").

53. *Hughes*, 399 S.E.2d at 25.

54. *Id.* at 26.

55. *Id.*

56. *Id.* (quoting *Lyon*, 82 S.C. at 189, 63 S.E. at 888).

constitutional and common law right of the public to the unobstructed use of waters which are, in fact, navigable."[57] The court also rejected Nelson's private property argument. Nelson supported this argument with an opinion by the South Carolina Attorney General which states that " 'a canal built entirely on private property, with private funds and for private purposes, is a private thing, for the same reasons that a road built on private property for private purposes is a privately owned road.' "[58] Underlying the Attorney General's opinion, however, is the assumption that "the public had been 'continuously and consistently excluded' " from using the canal.[59] The *Hughes* court concluded that the opinion was inapplicable to the instant case because the public had not been "continuously and consistently excluded" from using the canal.[60]

Whether a canal that connects to a river may constitute navigable waters when the public is continuously denied access to the canal remains an open question. The answer depends on the courts' acceptance of the Attorney General's opinion. If the courts accept the opinion,[61] the question becomes how to define the scope of a "continuous and consistent" exclusion.[62] *Hughes* establishes, however, that sporadic attempts over a fifteen-year period to deny access to the public are insufficient.

*William G. Lyles, III*

## III. Scope of Modification Provisions in Restrictive Covenants Defined

In *Erkes v. Kasparek*[63] the South Carolina Court of Appeals held that an amendment to a subdivision's restrictive covenants, which im-

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57. *Id.*

58. *Id.* (quoting 1986 Op. S.C. Att'y Gen. No. 86-99, at 304).

59. *Id.* at 26 (quoting 1986 Op. S.C. Att'y Gen. No. 86-99, at 303). The Attorney General's opinion cited *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979) (per curiam), as support for this proposition. In *Vaughn* the United States Supreme Court held that a privately constructed canal system is not a navigable waterway. *Id.* at 208-09. In *Vaughn* the owner of the land surrounding the canals posted over 400 "No Trespassing" signs and employed individuals to patrol the canals. *Id.* at 207. On numerous occasions these employees prevented strangers from entering the canals. *Id.*

60. *Hughes*, 399 S.E.2d at 26.

61. The *Hughes* court reacted to the Attorney General's opinion by "[a]ssuming, without deciding, that the opinion is correct." *Id.*

62. The Attorney General decided that this issue was a question of fact. *See* 1986 Op. S.C. Att'y Gen. No. 86-99, at 304.

63. 399 S.E.2d 6 (S.C. Ct. App. 1990) (per curiam), *cert. denied*, No. 1541, Advance Sheet 3 (S.C. Feb. 9, 1991).

posed a minimum size for future lots, was null and void. The facts which the court found determinative were that the residents who attempted to implement the amendment did not have authority over the unsold property in the subdivision, the developers of the property reserved the right to subdivide the remaining property at their own discretion, and the residents were adding new restrictions rather than amending or changing the existing restrictions.[64]

Appellants George R. Erkes and James D. Quinn (the Developers) purchased a 176 acre tract of land in York County, South Carolina in 1952. In 1955 the Developers began to sell individual lots subject to restrictive covenants, which they had placed on the use and development of the land. The instrument that imposed the restrictive covenants on the subdivision provided that "any of the conditions, restrictions, and covenants herein contained may be changed, or amended in any manner by the mutual consent in writing of 51% of the owners of all lots in the development."[65]

Pursuant to this provision, the Developers amended the restrictive covenants twice. In 1960 the Developers raised the minimum cost allowed for homes in the subdivision, and three years later they changed the minimum requirements for setback lines. In 1987 the residents of the subdivision tried to amend the restrictive covenants. They drafted several amendments, one of which established a minimum lot size. The Developers objected to the amendment that established a minimum lot size and began legal proceedings to nullify it.[66]

The matter was referred to a special referee who recommended that the amendment be canceled. The circuit court rejected the referee's recommendation and found that the residents' amendment was valid. The Developers appealed to the South Carolina Court of Appeals and sought a declaratory judgement that would nullify the residents' amendment.[67]

The court of appeals ruled in the Developers' favor. The court gave three reasons for its decision. First, the court stated that the residents did not have the authority to establish a minimum lot size for the parcels that had not been sold. The court reached this conclusion by reliance on the proposition that power over the disposition of property can only be granted "by an instrument executed with the same formalities as would be necessary for the disposition of the property they purport to restrict."[68] The court reasoned that because such an

64. *Id.* at 7-8.
65. Brief of Appellants at 2.
66. *Erkes*, 399 S.E.2d at 7.
67. *Id.*
68. *Id.* (citing Home Sales, Inc. v. City of N. Myrtle Beach, 299 S.C. 70, 77, 382

instrument did not exist, the residents did not have the authority to establish a minimum lot size.[69]

Second, the court determined that the language of the restrictive covenants impliedly reserved to the Developers the unrestricted right to subdivide the remaining land in the tract. The court reasoned that because restrictive covenants are contractual in nature, the residents agreed to the Developers' reservation of rights when they purchased their lots. Thus, the residents were bound by the reservation and could not attempt to modify the Developers' rights to subdivide the tract.[70]

Third, the *Erkes* court found that the residents did not amend or change existing restrictive covenants, but instead improperly created a new covenant. The court determined that the provision of the restrictive covenant that allowed the restrictions to be changed or amended pertained only to the modification of existing restrictions. The court found that the language of the covenant proved that the Developers intended to limit modification of the restrictive covenants to those already in existence. The court then noted that the original restrictions made no reference to lot sizes. The court concluded, therefore, that the residents did not have the power to add a new restriction on minimum lot size.[71]

In holding that the amendment was a newly created restriction and not a modification, the court of appeals strictly construed the terms "change" and "amend" in the covenant. The court also considered South Carolina's policy that favors freedom in the owner's use of property. In light of this policy, even if the Developers' intent had been less clear, the residents' ability to place additional restrictions on the property would still have been limited.[72]

The *Erkes* decision conforms to the approach taken by other jurisdictions that have addressed the issue.[73] Courts in some other jurisdictions have held, however, that restrictive covenants may be modified to increase, reduce, or eliminate restrictions.[74] These cases do not directly

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S.E.2d 463, 467 (Ct. App. 1989) (per curiam)).

69. *Id.* at 8.

70. *Id.*

71. *Id.*

72. *Id.* (citing Hamilton v. CCM, Inc., 274 S.C. 152, 157-58, 263 S.E.2d 378, 381 (1980)); Davey v. Artistic Builders, Inc., 263 S.C. 431, 211 S.E.2d 235 (1975).

73. Lakeland Property Owners Ass'n v. Larson, 121 Ill. App. 3d 805, 810, 459 N.E.2d 1164, 1169 (Ill. Ct. App. 1984) (finding that a provision in a restrictive covenant which specifically stated that residents could change "the said covenants" referred to existing, but not additional, covenants); Van Deusen v. Ruth, 343 Mo. 1096, 1101, 125 S.W.2d 1, 2-3 (1939) (holding that language in a restrictive covenant that referred to the "foregoing provisions" applied to the existing provisions and thus precluded any additional restrictions).

74. *See* Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n, 177 Cal. App. 3d 726, 223

conflict with the *Erkes* opinion because they hold that existing restrictions may be modified to be more or less restrictive and *Erkes* holds that completely new restrictions may not be added to restrictive covenants. Thus, the *Erkes* decision brings South Carolina in line with other jurisdictions on this issue.

*Dunn D. Hollingsworth*

## IV. Court Avoids Entanglement in Church Dispute by Holding Plaintiffs Lacked Standing to Sue

In *Blair v. Blair*[75] the South Carolina Court of Appeals held that two persons suing as trustees of a minority faction of a divided church congregation did not have standing to maintain an action to quiet title to property mortgaged pursuant to a vote of the majority because the two persons were neither trustees of the minority faction nor beneficiaries of the purported trust containing the property. This holding reflects the well-established rule in South Carolina of judicial deference to ecclesiastical decisions.[76]

*Blair* involved a dispute among church members over the disposition of church property. In 1952 the pastor of Pearson Welcome Baptist Church (PWBC) and his wife deeded a building and its lot to Charles Blair, Charles Blair, Jr., William Blair, Richboroug Blanding, and Limas Nelson as trustees of PWBC. The deed provided that the named grantees were " '[t]o hold, preserve and control the [property] for the use and benefit of the membership of the Pearson Welcome Baptist Church.' "[77]

In 1983 the majority of the congregation voted to mortgage the property, use the proceeds to move to a new building, and change the church's name to Peoples Baptist Church. To facilitate this plan the majority authorized Charles Blair, Jr. and William Blair to deed the property to themselves as trustees of Peoples Baptist Church. Charles Blair, Jr. and William Blair then mortgaged the property and used the proceeds to buy a new church building.[78]

Meanwhile, a minority of the congregation had resolved to remain in the old building and to continue under the old name. After Charles Blair, Jr. and William Blair executed the mortgage, Charles Blair and

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Cal. Rptr. 175 (1986); French v. Diamond Hill-Jarvis Civic League, 724 S.W.2d 921 (Tex. Ct. App. 1987).

75. 396 S.E.2d 374 (S.C. Ct. App. 1990).

76. *See infra* note 89 and accompanying text.

77. *Blair*, 396 S.E.2d at 375 (quoting deed).

78. *Id.* at 376.

Limas Nelson brought an action as trustees of PWBC[79] to quiet title to the property in themselves and to invalidate the mortgage.[80]

The master in equity found that Charles Blair, Jr. and William Blair, as trustees of Peoples Baptist Church, took title to the property by means of the 1983 deed to themselves. The mortgage, therefore, was valid. The circuit court affirmed the master's determination. The court of appeals affirmed, but on the ground that both plaintiffs lacked standing to sue.[81]

The court of appeals found that neither Charles Blair nor Limas Nelson were trustees of PWBC.[82] The court affirmed the master's finding that Charles Blair was a deacon, and not a trustee, of PWBC.[83] The court also affirmed the master's finding that Limas Nelson ceased to be a member of PWBC more than twenty years prior to the commencement of the suit.[84] Therefore, he was not a trustee.

The court further held that neither Charles Blair nor Limas Nelson were beneficiaries of the trust created by the 1952 deed. The court noted that the 1952 deed conveyed the property "for the 'benefit of the membership of the Pearson Welcome Baptist Church.' "[85] The court first concluded that Limas Nelson could not possibly be a beneficiary of the trust because he had not been a member of PWBC for more than two decades.[86] The court applied similar reasoning to Charles Blair. The court stated:

> Because the action of Pearson Welcome Baptist Church in changing its name to Peoples Baptist Church was valid, the congregation of Pearson Welcome Baptist Church became the congregation of Peoples Baptist Church. It cannot be gainsaid that Charles Blair or any member of the minority faction of the split congregation continued to be a member of the congregation intended to be benefitted by the 1952 deed.[87]

Thus, Charles Blair, like Limas Nelson, lacked standing to enforce any rights created by the 1952 deed.[88]

The *Blair* court's analysis adheres to the well-established principle

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79. *Id.* at 374.
80. *Id.* at 376.
81. *Id.*
82. The court noted that "Charles Blair and Limas Nelson sue[d] as trustees [and] not as members or representatives of the membership of Pearson Welcome Baptist Church." *Id.* at 376 n.3.
83. *Id.* at 376.
84. *Id.*
85. *Id.* at 377 (quoting deed).
86. *Id.*
87. *Id.*
88. *Id.* at 378.

that ecclesiastical decisions are not subject to judicial review absent fraud, collusion, or arbitrariness.[89] In *Turbeville v. Morris*[90] the South Carolina Supreme Court stated, "[I]n South Carolina the Courts of law in considering a civil right which is dependent upon an ecclesiastical matter will accept as final the decision of a legally constituted ecclesiastical tribunal having jurisdiction of the matter."[91] The *Blair* court found "that the actions of Pearson Welcome Baptist Church in changing its name, moving to a new location, transferring the property, and mortgaging it were valid and consistent with Baptist church policy."[92] Thus, the court properly refused to intervene.

*Lisa M. Woodbury*

## V. Interstate Boundary Dispute Between South Carolina and Georgia Resolved

In *Georgia v. South Carolina*[93] the United States Supreme Court resolved an interstate boundary dispute that involved an area along the Savannah River which extended from just northwest of the city of Savannah downstream into the Atlantic Ocean. The decision fixed the boundary between the two states and provided an illustrated mechanism for determining when the evolution of the Savannah River alters this boundary.

In 1732 the King of England issued a charter for the Colony of Georgia.[94] The Charter described the boundary between the Colony of Georgia and the Colony of South Carolina as "the most northern part of a stream or river there, commonly called the Savannah."[95] In February 1787 Georgia imposed a tax on all ships entering the port of Savannah.[96] This event and the continuing dispute concerning the precise location of the boundary precipitated a meeting in Beaufort, South

89. *Id.* at 377 (citing Hatcher v. South Carolina Dist. Council of the Assemblies of God, Inc., 267 S.C. 107, 226 S.E.2d 253 (1976)); *cf.* Turbeville v. Morris, 203 S.C. 287, 315, 26 S.E.2d 821, 832 (1943) ("These matters present questions of a purely ecclesiastical nature. . . . The Courts of South Carolina will not go behind the decisions of ecclesiastical tribunals on questions of this nature, by making the slightest inquiry into their wisdom.").

90. 203 S.C. 287, 26 S.E.2d 821 (1943).

91. *Id.* at 306, 26 S.E.2d at 828.

92. *Blair*, 396 S.E.2d at 377.

93. 110 S. Ct. 2903 (1990).

94. *Id.* at 2907.

95. *Id.*

96. First Report of the Special Master 7 (1985) [hereinafter 1 Rep.].

Carolina of representatives from each state.[97] These discussions produced the Treaty of Beaufort, which was signed on April 28, 1787 and subsequently ratified by each state's legislature and by the Continental Congress.[98]

The Treaty's first article established the boundary between the states as " '[t]he most northern branch or stream of the river Savannah . . . reserving all the islands in the said river[] Savannah . . . to Georgia.' "[99] The first article stated that this would be the boundary " 'forever hereafter.' "[100] The Treaty's second article secured to citizens of both states the right to traverse the principal stream free from tolls or other hindrances " 'attempted to be enforced by one State on the citizens of the other.' "[101]

The Treaty of Beaufort, along with interpretive guidelines that were enunciated by the United States Supreme Court in 1922,[102] provided the legal framework for resolving the most recent boundary dispute between Georgia and South Carolina. In 1922 the Court held that where the Savannah River was free of islands the boundary between the states runs midway between the banks and where it was not free of islands the boundary runs midway between the island bank and the South Carolina bank.[103] The Court in 1990 agreed with these guidelines, but concluded that they referred to the islands as they existed in 1787.[104]

Although in 1990 the Court recognized that the natural evolution of the river could alter the banks and thus the boundary,[105] the Court rejected Georgia's contention that the emergence of islands in the river after 1787 worked a similar change. Georgia argued that the provision in the Treaty's first article "reserving all the islands in the said river[] Savannah . . . to Georgia" places in Georgia all islands whenever they emerge.[106] Georgia also argued that each time an island emerges the boundary shifts to the north to the midline between the new island's bank and the South Carolina shore.[107] The Court rejected this argument and stated that such an interpretation contradicts the provision

97. *See* Georgia v. South Carolina, 110 S. Ct. at 2907.

98. *Id.* at 2907-08.

99. *Id.* at 2908 n.1 (quoting Treaty of Beaufort, Apr. 28, 1787, Georgia-South Carolina, art. 1, 1 S.C. Stat. 411, 413 (1836)).

100. *Id.*

101. *Id.* (quoting Treaty of Beaufort, Apr. 28, 1787, Georgia-South Carolina, art. 2, 1 S.C. Stat. 411, 413 (1836)).

102. Georgia v. South Carolina, 257 U.S. 516 (1922).

103. *Id.* at 523.

104. Georgia v. South Carolina, 110 S. Ct. at 2915.

105. *Id.* at 2916.

106. *Id.* at 2915.

107. *Id.*

in the Treaty's first article that established the boundary " 'forever hereafter.' "[108] Georgia's solution "would create a regime of continually shifting jurisdiction,"[109] and the Court found that this solution would not "comport[] with the principles of simplicity and finality that animated the Court's reading of the Treaty in 1922, . . . [or] with the respect for settled expectations that generally attends the drawing of interstate boundaries."[110]

Another point of contention involved the Barnwell Islands area, which in South Carolina's estimation was "the most valuable land in the present dispute."[111] Georgia did not appeal the Special Master's recommendation that the Rabbit Island area be declared part of South Carolina.[112] Rather, it argued that the activity of the Army Corps of Engineers which led to the other three islands joining together and then joining the South Carolina mainland does not work a similar change in the boundary. Georgia contended that the boundary should proceed along the same path it had followed before the activity of the Corps of Engineers caused this part of the boundary to be surrounded by land. South Carolina countered by accepting Georgia's rationale, but argued the state had acquired ownership of the entire area by prescription and acquiescence.

The Court held that the history of the Barnwell Islands, along with Georgia's "long inaction in the face of [South Carolina's] continuing and obvious exercise of dominion since 1795,"[113] established South Carolina's claim by prescription and acquiescence.[114] The Court rejected Georgia's argument that the 1955 decision in *United States v. 450 Acres of Land*[115] terminated whatever dominion South Carolina exercised by breaking the continuous possession requirement necessary to prove prescription.[116] The Court pointed out that South Carolina was not a party to the suit and that the Court at the time had denied South Carolina's petitions which requested that the Court resolve the boundary dispute in the Barnwell Islands area.[117]

Continuing downstream, the area along the northern bank known as Southeastern Denwill presented the next problem. The Corps of Engineers erected a training wall in the late nineteenth century that ex-

108. *Id.* at 2915-16.
109. *Id.* at 2915.
110. *Id.* at 2916.
111. *Id.* at 2911.
112. *Id.*
113. *Id.* at 2913.
114. *Id.* at 2914.
115. 220 F.2d 353 (5th Cir.), *cert. denied*, 350 U.S. 826 (1955).
116. Georgia v. South Carolina, 110 S. Ct. at 2913.
117. *Id.*

tended from the South Carolina bank. In subsequent years the Corps dumped dredge material in this location. The area behind the wall eventually became dry land.

Georgia contended that the artificial extension of the bank does not alter the boundary. It also argued that the portion of Southeastern Denwill that crosses the former midpoint between the northern bank and Elba Island's northern shore belongs to Georgia.[118] South Carolina responded by conceding that although the initial stimulus was man-made, the changes that led to the emergence of land were primarily natural and took a considerable time to complete.[119] Such changes, South Carolina argued, should shift the boundary south to a new midline between the banks.

The Court cited *Arkansas v. Tennessee*[120] for the controlling legal principles.[121] In that case the Court stated:

> It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.[122]

The Court sided with Georgia.[123] The Court noted the rapidity of the dredging and other processes and affirmed the Special Master's conclusion that these changes were primarily avulsive and therefore worked no change in the boundary.[124]

The final points of contention involved the location of the boundary in the river's mouth and how the boundary proceeds into the ocean. The initial step in resolving this aspect of the controversy required a precise determination of the location of the river's mouth. Both parties agreed that Tybee Island confines the river's mouth to the south. The disagreement stemmed from the absence of a reasonably close land formation north of Tybee.

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118. *Id.* at 2919.
119. *Id.*
120. 246 U.S. 158 (1918).
121. Georgia v. South Carolina, 110 S. Ct. at 2919.
122. Arkansas v. Tennessee, 246 U.S. at 173.
123. Georgia v. South Carolina, 110 S. Ct. at 2919.
124. *Id.* at 2920.

South Carolina contended that the underwater shoal extending east from the Oyster Bed Island area constitutes the corresponding functional equivalent of Tybee Island. This shoal also provides the northern border for the main navigational channel. South Carolina argued that the boundary should be in the middle of this channel. The Court affirmed the Special Master's recommendation in favor of South Carolina's position and noted that the underwater shoal had been "long recognized as confining the river."[125]

The determination of the river's mouth provided the starting point for the Court's resolution of the final issue, the location of the lateral seaward boundary. The complicating factor that led to the dispute involved each state's coastal geography.[126] The states' coasts do not run at exactly the same angle from due north. Georgia's coast is the more vertical of the two. "[L]ines drawn perpendicularly from each coast overlap off the coast"[127] rather than paralleling each other. The Special Master addressed this complication by drawing a line from Hilton Head's most southern point to Tybee Island's most northern point. This reference line is an apparent compromise between each state's coastline.[128] Where the boundary in the river's mouth intersects this line, it shifts southeasterly and extends into the ocean perpendicular to that line.[129] The Court concluded that the Special Master's recommendation gave "equitable balance" to the competing interests.[130]

An attempt to give "equitable balance" to the competing state interests appears to animate much of the Court's opinion. This is especially evident in the Court's decision on the impact on the boundary of islands that emerged in the river after the states signed the Treaty of Beaufort in 1787. The Treaty of 1787 established the boundary as " '[t]he most northern branch or stream of the river Savannah . . . reserving all the islands in the said river[] Savannah . . . to Georgia.' "[131] The Special Master decided this provision reserved to Georgia only those islands existing in 1787. Georgia argued that the Treaty guaranteed Georgia all islands whether they emerged prior or subsequent to 1787.

The Court concluded that the Treaty did not reserve to Georgia

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125. *Id.* at 2917.

126. *Id.* at 2920.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 2922. The Treaty of Beaufort offered no guidance on this issue because it did not mention the lateral seaward boundary. *Id.* at 2921.

131. *Id.* at 2908 n.1 (quoting Treaty of Beaufort, Apr. 28, 1787, Georgia-South Carolina, art. 1, 1 S.C. Stat. 411, 413 (1836)).

islands emerging after 1787.[132] The language of the two documents that guided the Court's analysis, the Treaty and the Court's 1922 decision, provided major obstacles to reaching this determination. The Treaty contains no hint that the reservation clause covers only those islands then in existence.[133] Moreover, the 1922 decision does not contain any words of limitation that involve when an island emerged. The Court in 1922 decreed "[t]hat islands in the Chattooga River are reserved to Georgia as completely as are those in the Savannah or Tugaloo rivers."[134]

The Court refused to interpret the Treaty to its logical end. Instead, it held that the drafters could not have intended that each new island "would alter the boundary line to a degree that could be dramatically out of proportion to the physical change brought about by the formation of the island itself."[135] The Court disposed of the 1922 Court's decree by stating that "[n]o issue of after-emerging islands was even before the Court."[136] Thus, the Court held that the decision was not controlling.[137]

It seems equally plausible to suggest that the commissioners from each state who met in Beaufort in 1787 chose certain phrases and omitted others with the understanding that the language chosen would provide the definitive guide for those interpreting their work. Perhaps the reservation clause means exactly what logic suggests it means; that is, "reserving all the islands in the said river[] Savannah . . . to Georgia" means that all islands in the Savannah belong to Georgia. The commissioners met to fashion a document to control the future, not the past. The Treaty looked forward and spoke only of "all the islands." The commissioners easily could have limited this phrase by inserting "now existing" after it. They did not.

The question then arises: why would the South Carolina commissioners and the Legislature that ratified the Treaty have agreed to such a concession? "The principal controversy between the Colonies of Georgia and South Carolina during the pre-1787 days involved the navigation rights on the Savannah River, with Georgia claiming exclusive navigation rights to the River."[138] Georgia's claim derived colorable support from its colonial charter, which described the boundary between Georgia and South Carolina as the "most northern part" of the

132. *Id.* at 2915-16.

133. *See id.* at 2925 (Kennedy, J., dissenting) (arguing that the South Carolina view adopted by the Court renders the reservation clause "superfluous").

134. Georgia v. South Carolina, 257 U.S. 516, 523 (1922).

135. Georgia v. South Carolina, 110 S. Ct. at 2916.

136. *Id.*

137. *Id.* at 2915.

138. 1 Rep., *supra* note 96, at 5.

Savannah River.[139] As the interest of South Carolinians in the state's interior increased, Georgia's claim became more troublesome.[140] In February 1787 Georgia imposed a tax on all ships entering the port of Savannah.[141] This event, the more general navigation concerns, and the continuing boundary dispute prompted the Beaufort conference just two months later. South Carolina may have been willing to concede all islands in the Savannah whenever formed to Georgia in exchange for what today is redundant: the right to travel the Savannah " 'exempt from all duties, tolls, hindrance, interruption or molestation whatsoever, attempted to be enforced by one State on the citizens of the other.' "[142]

In article one of the Treaty South Carolina conceded to Georgia all islands in the Savannah whenever formed in exchange for Georgia's guarantee in article two of unfettered access for South Carolinians to the river. The price paid by South Carolina does not seem quite so high when viewed in its historical context. However, when South Carolina and Georgia adopted the Federal Constitution they granted to Congress the power "[t]o regulate Commerce . . . among the several States."[143] The power possessed by Georgia and South Carolina to regulate commerce between the two states was disgorged.[144] Thus, only a few short years after South Carolina entered the Treaty, it lost the benefit of its bargain. Given these considerations, perhaps the Court's interpretation is appropriate not because it is faithful to the Treaty-makers' intent, but because notions of fundamental fairness militate against permitting Georgia to enforce the reservation clause to its fullest extent.

*Georgia v. South Carolina* resolved a longstanding boundary dispute. An interpretation of the Treaty of Beaufort was central to the Court's analysis. However, notions of fundamental fairness colored much of the decision and fostered results that a strict reading of the Treaty might not support. The decision should prevent future disputes because it fixes the exact location of the boundary in the area around Savannah and provides a method for determining the boundary throughout the Savannah River.

*Stanley C. Rodgers*

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139. Georgia v. South Carolina, 110 S. Ct. at 2907.

140. 1 Rep., *supra* note 96, at 5.

141. *Id.* at 7.

142. Georgia v. South Carolina, 110 S. Ct. at 2908 n.1 (quoting Treaty of Beaufort, Apr. 28, 1787, Georgia-South Carolina, art. 2, 1 S.C. Stat. 411, 413 (1836)).

143. U.S. CONST. art. I, § 8, cl. 3.

144. South Carolina v. Georgia, 93 U.S. 4, 9-10 (1876).